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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.10.2021

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THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.387 OF 2020

AND

CRL.M.P.NO.5914 OF 2020

Karthi ... Appellant/Sole Accused

.Vs.

The State Represented by
The Inspector of Police,
All Woman Police Station.,
Erode District.
Crime No.2 of 2016.

... Respondent/Complainant

PRAYER:-

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to set aside the judgment dated 26.02.2020 made in Spl.S.C.No.10 of 2019 on the file of the learned Sessions Judge, Magalir Neethimandram, Erode and allowing the appeal throughout by acquitting the appellant.

For Appellant : Mr.B.M.Subash
For Mr.B.Mohan

For Respondent : Mr.S.Sugendran
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the judgment dated 26.02.2020 passed in Spl.S.C.No.10 of 2019 by the learned Session Judge, Magalir Neethimandram, Erode.

2. The case of the prosecution is that the victim girl and her mother was living in a row house at Manickampalayam, Erode. The accused, who is the neighbour of the victim girl, already got married and has a child through the wedlock. The accused developed relationship with the victim girl stating that he does

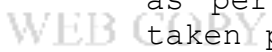


not wish to live with his wife, he wanted to divorce her and marry the victim girl. On 15.10.2016, when the victim girl went to house of the accused, at that time the accused by making promise to marry her, had compelled her to have sexual intercourse, knowing well that the victim girl belongs to Scheduled Caste. When the mother of the victim girl enquired about missing of the victim girl, the accused informed that the victim was in his house and P.W.1 tried to bring her relatives stating that the accused kidnapped the victim girl. Hence, the mother of the victim girl lodged a complaint/Ex.P1 against the accused/appellant.

3. The respondent police registered a case in Crime No.2 of 2016 for the offence under Section 363 IPC later altered into Section 366 IPC and Section 4 of The Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'POCSO Act' for the sake of convenience] and subsequently, altered into Sections 366 IPC, 4 of POCSO Act and 3(1)(w)(ii) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 [hereinafter referred to as 'SC/ST Act' for the sake of convenience]. On completion of the investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court) Erode. Since the offence is against a girl child, it falls under the definition of 2(1) (d) of POCSO Act. After completing the formalities, the learned Sessions Judge taken the case on file in Spl.S.C.No.10 of 2019 and charges were framed against the accused/appellant for the aforesaid offences.

4. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 18 witnesses were examined as P.W.1 to P.W.18 and marked 26 documents as Ex.P1 to Ex.P26. Besides that one material object was marked as M.O.1. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused/ appellant and questioned under Section 313 of Cr.P.C and he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

5. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the accused/appellant is guilty for the offence punishable under Section 4 of POCSO and convicted and sentenced him to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.25,000/-, in default, to undergo simple imprisonment for a period of three months. The accused/appellant is acquitted from the charges under Section 235(1) Cr.P.C for the offence under Section 366 IPC and Section



6.1 The learned counsel for the appellant would submit that as per the prosecution the alleged occurrence is said to have taken place on 15.01.2016. While recording the statement of the victim girl under Section 164 Cr.P.C before the learned Judicial Magistrate on 22.1.2016, she stated that the appellant did not take her to anywhere else and nothing was happened on the date of occurrence. However, she has stated that since the Doctor threatened her during the medical examination on 19.01.2016, she has stated that once she was subjected to penetrative sexual assault by a known person. However, during the trial, the victim girl/P.W2 has deposed that the appellant committed penetrative sexual assault on her for more than once. Therefore, the evidence of the victim girl during trial is totally contra to her statement recorded under Section 164 Cr.P.C. Since the victim girl was tutored by her mother, she made a false allegation against the appellant during trial.

7. The learned Government Advocate (Crl.Side) for the respondent would submit that at the time of occurrence, the victim girl was only 15 years. In order to prove the age of the victim girl, the prosecution examined P.W.13/Doctor, who conducted radiology test on the victim girl has opined that the age of the victim girl is above 16 years, but, below 18 years and issued Age certificate, which was marked as Ex.P15. Further, Ex.P4/Birth Certificate and Ex.P7/School Record Sheet clearly



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show that the date of birth of the victim girl is 16.08.2000, whereas, the date of occurrence happened on 15.1.2016. Hence, the prosecution has proved that at the time of occurrence, the victim girl was a child. After registration of the complaint, the victim girl was secured by the respondent police and produced before the Doctor/P.W.12 for medical examination, at that time, she has clearly stated that she was subjected to sexual intercourse by a known person at once i.e. on 15.1.2016. Further, on medical examination, the Doctor found that there was no external injury, but, hymen was not intact and the victim girl might have subjected to sexual intercourse and she has given Ex.P12/Medical report. Subsequently, the victim girl was produced before the learned Judicial Magistrate for recording her statement under Section 164 Cr.P.C., in which, she accepted the earlier statement given before the Doctor, but, she has stated that since the Doctor threatened her, she stated that once the appellant has committed penetrative sexual assault on her. The victim girl admitted that the appellant had sexual intercourse with her. During the trial, the victim girl/P.W.2 clearly narrated the said incident. From the evidence of P.W.2, P.W.12, P.W.13, Ex.P4, Ex.P7, Ex.P12 and Ex.P13, the prosecution has proved its case beyond all reasonable doubts. The trial Court has rightly appreciated the entire evidence and convicted and sentenced the appellant and hence, the appeal is liable to be dismissed.

8. Heard the learned counsel for the appellant and the learned Government Advocate (Crl.Side) appearing for the respondent and also perused the materials available on records.

9. This Court, being an Appellate Court, is a final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding.

10. In order to substantiate the charges framed against the appellant on the side of the prosecution the victim girl was examined as P.W.2 and she has clearly narrated the said incident. The learned counsel for the appellant contended that no previous statement was recorded from the victim girl and only she was tutored by her parents. In Ex.P2/Statement under Section 164 Cr.P.C., the victim girl has not stated that the appellant committed penetrative sexual assault on her. Since the Doctor, who examined the victim girl threatened her, she revealed with fear that she was subjected to penetrative sexual assault by a known person. The learned counsel for the appellant further contended that the victim girl was tutored by her parents. Originally, the case was registered against the appellant for the offence under Section 363 IPC and subsequently, after investigation the respondent police filed charge sheet under Sections 366 IPC, 3 punishable under Section 4 of POCSO Act and



3(1)(w)(ii) SC/ST Act. After trial, the appellant acquitted from the charges under Section 366 IPC and Section 3(1)(w)(ii) of SC/ST Act and he was only convicted and sentenced for the offence under Section 3 which is punishable under Section 4 of POCSO Act. Challenging the said the acquittal neither the State nor the victim girl filed any appeal.

11. As far as the age of the victim girl is concerned, the prosecution proved that at the time of occurrence, the victim girl was only 15 years and also exhibited Ex.P4/Birth Certificate and Ex.P7/Record Sheet, in which, the date of birth of the victim girl was mentioned as 16.08.2000, whereas, the date of occurrence happened on 15.1.2016. Further, the prosecution also exhibited Ex.P15/Age certificate. There is no contra evidence, the defence has not rebutted the presumption that the age mentioned in the Birth Certificate is not a genuine one. Therefore, from Ex.P4, Ex.P7 and Ex.P15 the prosecution proved that at the time of occurrence, the victim girl was a child, under the definition of 2(1)(d) of POCSO Act.

12. A reading of deposition of the victim girl, during trial clearly shows that she was subjected to penetrative sexual assault by the appellant on several times. Though as pointed out by the learned counsel for the appellant that at the time of recording the statement of the victim girl under Section 164 Cr.P.C she stated that she was subjected to penetrative sexual assault by a known person at once i.e. on 15.1.2016. The statement of the victim girl was corroborated with the evidence of P.W.12 and Ex.P12.

13. On a combined reading of the evidence of P.W.2/victim girl, Ex.P2/Statement of the victim girl recorded under Section 164 Cr.P.C. and the evidence of P.W.12/Doctor, this Court finds that the prosecution proved that the victim girl was subjected to penetrative sexual assault. However, a careful reading of the entire materials, it reveals that only with the consent of the victim girl, the appellant had sexual intercourse with her. Therefore, the only question that has to be decided is, whether the victim girl was subjected to penetrative sexual assault by appellant forcibly or not. At the time of occurrence, the victim girl was only 15 years, and hence, consent is immaterial. Even assuming that with the consent of the victim girl once the appellant committed sexual intercourse, the same falls under POCSO Act. Though there is a contradiction in the evidence of the victim girl during trial and her statement recorded under Section 164 Cr.P.C., however, considering the facts of the case and based on the medical records, this Court finds that the victim girl was subjected to penetrative sexual assault by the appellant.



14. This Court, being an Appellate Court re-appreciated the entire materials and finds that the victim girl was subjected to penetrative sexual assault by the appellant. Since the victim girl was 15 years at the time of occurrence, consent is immaterial. Normally the girls did not reveal this type of incidents to anybody and that she tried to suppress the said incident, before the learned Judicial Magistrate while recording her Statement under Section 164 Cr.P.C. However, during trial she has clearly narrated the said incident. Further, the evidence of the victim girl is corroborated with the medical evidence.

15. In view of the above, this Court finds that the victim girl was a minor at the time of occurrence and therefore, the offence committed by the appellant falls under Section 3 which is punishable under Section 4 of POCSO Act. The trial Judge rightly convicted the appellant for the offence under Section 3 which is punishable under Section 4 of POCSO Act and awarded punishment of twenty years rigorous imprisonment. However, on the date of occurrence, the minimum sentence for the above said charged offence is only seven years in view of the amendment of the penal section 4(2) w.e.f. 16.08.2019. Therefore, this Court finds that the conviction imposed by the trial Court under Section 3 which is punishable under Section 4 of POCSO Act is confirmed. However, the sentence is modified from twenty years to seven years.

16. With the above modification, this Criminal Appeal is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Magalir Neethimandram,
Erode.
2. The Inspector of Police,
All Woman Police Station.,
Erode District.



3. The Public Prosecutor,
High Court, Madras.

4. The Superintendent,
Central Prison,
Coimbatore.

5. The Deputy Registrar, | with a direction to send back the
(Criminal Section), | original records, if any, to the
High Court, Madras. | trial Court

Copy To:-

The Honourable POCSO Committee,
High Court, Madras.

CRL.A.NO.387 OF 2020 AND
CRL.M.P.NO.5914 OF 2020

SRA(CO)
PBS/06/01/2022